In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1478

BELMER LEWIS WRIGHT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question is whether in the circumstances of this case a search and seizure by an immigration and customs officer violated the Fourth Amendment.

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner (together with Elizabeth Clare Farmer) was convicted of having possessed 319 pounds of marihuana, with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment to be followed by a special parole term of three years. The court of appeals affirmed on February 27, 1973 (Pet. App. A), and denied a petition for rehearing on March 28, 1973 (Pet. App. B). The petition for a writ of certiorari was filed on May 1, 1973, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

Petitioner contends here that the marihuana admitted in evidence at trial was seized as a result of an unconstitutional search of his automobile. The evidence,[1] which is not in dispute, showed that on May 8, 1972, at approximately 11:15 a.m., a blue 1971 Ford station wagon, driven by petitioner, with co-defendant Farmer as a passenger, was stopped at a temporary Border Patrol checkpoint 11 miles north of Laredo, Texas (and the Mexican border) on Interstate Highway 35 (Tr. 6-9). The checkpoint, which had traffic signs, about fifteen cones directing traffic to the side of the road, a stop sign, and a stop light, had been set up by Border Patrolman James W. Knight and his partner to check for traffic in illegal aliens (Tr. 6-7). After asking petitioner and his companion if they were both United States citizens, Officer Knight saw that a spare tire was lying on top of some luggage or other items in the rear of the wagon. This aroused the officers' suspicion because of their knowledge and experience that spare tire wells are often used to conceal aliens. Accordingly, Officer Knight asked petitioner to open the rear door of the station wagon (Tr. 9-10). As he looked inside the vehicle, the officer saw that the floor was covered by a white cloth. He pulled back the cloth and opened the rear seat compartment in the floor (which he thought was the spare tire well). He observed several large, heavily wrapped, plastic bundles and immediately smelled the odor of marihuana (Tr. 11-13). Petitioner was placed under arrest and the bags of marihuana were seized (Tr. 13).

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[1] By agreement, the evidence was taken before the trial court both for the purpose of determining the motion to suppress and upon the merits. Citations to the transcript of those proceedings are hereinafter designated "Tr."

Petitioner argues that the stop and search of his automobile violated his rights under the Fourth Amendment. In *Almeida-Sanchez* v. *United States*, No 71-6278, decided June 21, 1973, this Court invalidated, on Fourth Amendment grounds, the roving search of automobiles at random, conducted 25 miles from the Mexican border, on a road which at no point is less than 20 miles from the international boundary. As Mr. Justice Powell pointed out in his concurring opinion, however, that ruling did not "involve the constitutional propriety of searches at permanent or temporary check points removed from the border or its functional equivalent" (slip op. at 2). See, also, *United States* v. *McDaniel*, 463 F. 2d 129 (C.A. 5), certiorari denied, No. 72-84, June 25, 1973 (upholding as lawful a search of an automobile for aliens at a permanent border patrol checkpoint); *United States* v. *Bird*, 456 F. 2d 1023 (C.A. 5), certiorari denied, No. 71-1240, June 25, 1973 (upholding a search for aliens at a temporary checkpoint located on the same road only three miles from the checkpoint in this case). The search here took place at such a temporary checkpoint only about 11 miles from the border. This case thus involved a reasonable border patrol law enforcement practice, rather than the kind of random, roving search at a substantial distance from the border which this Court condemned in *Almeida-Sanchez*.[2]

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[2] In any event, there is no reason why *Almeida-Sanchez* should be applied retroactively to the instant case, since that decision affects neither the "'fair determination' of * * * guilt or innocence" (*Roberts* v. *Russell*, 392 U.S. 293, 294), nor the "integrity of the fact-finding process" (*Linkletter* v. *Walker*, 381 U.S. 618, 639). See *Linkletter* v. *Walker*, *supra*, 381 U.S. at 636-637. See also *Michigan* v. *Payne*, No. 71-1005, decided May 21, 1973; *McConnell* v. *Rhay*, 393 U.S. 2, 3; *Gosa* v. *Mayden*, No. 71-6314, decided June 25, 1973. This Court has held that decisions involving

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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the Fourth Amendment exclusionary rule are not retroactive. *E.g., Linkletter* v. *Walker, supra*; *Williams* v. *United States*, 401 U.S. 646; *Desist* v. *United States*, 394 U.S. 244. There is no reason to depart from that rule here.